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Federal Sector Arbitration under the Civil Service Reform Act of 1978

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Comments

FEDERAL SECTOR ARBITRATION UNDER THE CIVIL SERVICE REFORM ACT OF 1978*

This Comment explains and analyzes the various grievance arbitration and other dispute resolution procedures of the Civil Service Reform Act of 1978. The Act creates a confusing maze of forums empowered to hear and resolve federal sector labor relations disputes in addition to reviewing supposedly final and binding arbitration awards. The author stresses the importance of arbitral finality and urges the courts to exercise restraint when confronted with arbitration award appeals.

INTRODUCTION

Title VII of the Civil Service Reform Act of 1978[1] replaces Executive Order No. 11491[2] as the basic law governing labor relations

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1. Act of October 13, 1979, Pub. L. 95-454, 92 Stat. 1111 (1978) (codified at 5 U.S.C.A. § 7101 (West Supp. 1979)).

2. 3 C.F.R. § 861 (1966-1970 Compilation), *reprinted in* 5 U.S.C. § 7301 (1970) *as amended by* Exec. Order No. 11,616, 3 C.F.R. § 605 (1971-1975 Compilation) and Exec. Order No. 11,838, 3 C.F.R. § 957 (1971-1975 Compilation).

for federal sector employees,[3] and gives the federal sector labor-management relations program a statutory base, exempt from presidential revision. In some ways the Act parallels the private sector labor relations program as it exists under the National Labor Relations Act.[4] However, in other aspects it goes far beyond the provisions of the National Labor Relations Act and state public employee collective bargaining statutes.

One of the most novel and important provisions of the new Act involves the requirement that federal sector collective bargaining agreements provide for final and binding arbitration of federal sector labor relations disputes as part of the negotiated grievance procedure.[5] In the private sector, provision for a negotiated grievance arbitration procedure in the parties' collective bargaining agreement is a negotiable issue—it may be included or excluded by the parties. Absent a collective bargaining agreement, however, there is no requirement that federal sector labor relations disputes be submitted to arbitration. Rather, in the absence of a collective bargaining agreement, federal sector labor relations disputes must be processed pursuant to a statutory appeal procedure, if one covers the dispute, or pursuant to the agency-employer's internal grievance procedure, if one exists. Hence, arbitration in the federal sector under the Act does not constitute compulsory arbitration.

The scope of the negotiated grievance procedure itself is subject to negotiation in the private sector, and extends only to those matters which the parties have agreed it shall cover.[6] The negotiated grievance procedure in the federal sector collective bargaining agreement automatically extends to all matters covered by the Act's broad definition of "grievance"[7] unless the matter has

3. "Federal sector" refers to the governmental agencies of the United States and its employees.

4. 29 U.S.C. §§ 151-681 (1970).

5. Arbitration is a procedure in which the parties to a dispute voluntarily agree to be bound by the decision of an impartial or neutral third-party or panel outside of the judicial process. Labor arbitration is simply the arbitration of a grievance or dispute between an employer and the union representing his employees involving the application or interpretation of some term or aspect of the employment relationship. D. NOLAN, LABOR ARBITRATION LAW AND PRACTICE 1-2 (1979). The term "federal sector labor relations disputes" encompasses federal employee grievances concerning the interpretation or application of some provision of the collective bargaining agreement, and those matters which are subject to a statutory appeal procedure, such as employment discrimination complaints, adverse agency actions, prohibited personnel actions, and removals and demotions for unacceptable performance. *See* 5 U.S.C.A. §§ 2302, 4303, 7512, 7701, 7702 (West Supp. 1979).

6. Communications Workers v. New York Tel. Co., 327 F.2d 94 (2d Cir. 1964); D. NOLAN, LABOR ARBITRATION LAW AND PRACTICE 5 (1979).

7. 5 U.S.C.A. § 7103(a)(9) (West Supp. 1979).

been specifically excluded from the scope of the grievance procedure by the parties in their collective bargaining agreement,[8] or by the Act itself.[9] Consequently, arbitration extends to a variety of disputes that were not heretofore covered by the negotiated grievance procedure in the federal sector. The Act also presents federal sector employees with a variety of dispute forums for resolving federal sector labor relations disputes. The federal sector employee often must make an irrevocable election between raising the matter under the negotiated grievance arbitration procedure or of pursuing the matter under a statutory appeal procedure.[10]

In addition to substantive changes in the federal service labor-management relations program, the Act makes a variety of organizational changes. The Federal Labor Relations Authority (FLRA), modeled after the National Labor Relations Board, replaces the politicized Federal Labor Relations Council.[11] The FLRA exists as an independent agency within the executive branch, and is empowered to decide representation[12] and unfair labor practice cases,[13] negotiability disputes,[14] and appeals from arbitration awards.[15]

The purpose of this Comment is to explain and analyze the various grievance arbitration and other dispute resolution provisions of the Act. After a brief review of the development of arbitration in the federal sector, the framework and problems of processing

8. *Id.* § 7121(c).

9. *Id.* § 7121(d), (e), which exclude from the coverage of the negotiated grievance procedure grievances concerning: prohibited political activities; retirement, health or life insurance; suspensions or removals for national security reasons; examination, certification or appointment; or the classification of any position which does not result in the reduction in grade or pay of an employee.

10. *Id.* § 7121(e)(1), which involves such matters as removals or demotions for unacceptable performance, or adverse agency actions. These matters are appealable to the Merit Systems Protection Board (MSPB).

11. *Id.* § 7104. The Federal Labor Relations Authority (FLRA) is composed of three full-time members, one of whom must be an adherent of the political party not currently in power, and all of whom are appointed by the President with the advice and consent of the Senate and subject to removal only for cause. The Federal Labor Relations Council (Council) was composed of the Chairman of the Civil Service Commission, the Secretary of Labor, and such other officials of the Executive Branch as the President chose to designate from time to time. Exec. Order No. 11,491, *as amended*, § 4, *supra* note 2.

12. 5 U.S.C.A. § 7105(a)(2)(A)-(C) (West Supp. 1979).

13. *Id.* §§ 7105(a)(2)(G), 7118.

14. *Id.* §§ 7105(a)(2)(D), 7117(b), (c).

15. *Id.* §§ 7105(a)(2)(H), 7122.

federal sector labor relations disputes through the procedural maze established by the Act for "final and binding arbitration" are explored. Conclusions will then be drawn with respect to the adequacy of the changes made by the Act in the federal sector arbitration process and law.

THE EVOLUTION OF BINDING ARBITRATION IN THE FEDERAL SECTOR

In 1962, Executive Order No. 10988[16] legitimatized collective bargaining in the federal sector. Executive Order No. 10988 was initially hailed as a "Magna Carta for Public Employees."[17] It permitted federal agencies to enter into collective bargaining agreements with employee organizations that exclusively represented federal employees in appropriate bargaining units. The agreements could contain negotiated grievance procedures and provide for advisory arbitration of federal employee grievances, complaints, and misunderstandings.[18] Dissatisfaction with advisory arbitration, which made the decision or recommendation of the arbitrator subject to the approval of the agency head, and with the dual system for resolving grievances[19] resulted in the issuance of Executive Order No. 11491 in 1969.[20]

Executive Order No. 11491 required that the collective bargaining agreement include a negotiated grievance procedure as the exclusive procedure for employees covered by the agreement, but did not require the parties to provide for arbitration as part of that procedure. However, if the parties agreed to arbitrate employee grievances, conventional non-advisory arbitration was required. If the parties were unable to determine whether a statutory appeal procedure or the negotiated grievance procedure covered the employee's grievance, they were required to refer the matter to the Assistant Secretary of Labor for Labor-Management Relations.[21] Arbitrators had the authority to conclusively resolve disputes over the interpretation or application of collective bar-

16. 3 C.F.R. § 521 (1959-1963 Compilation), *reprinted in* 5 U.S.C. § 631 (1964).

17. Porter, *Arbitration in the Federal Government: What Happened to the "Magna Carta?"*, PROC. 30TH ANN. MTG. NAT'L ACAD. ARB. 93 (1978).

18. Exec. Order No. 10,988, § 3(b), 3 C.F.R. § 521 (1959-1963 Compilation), *reprinted in* 5 U.S.C. § 631 (1964). Notwithstanding the constraints imposed by Executive Order 10,988, 266 out of 380 agreements sampled in one study contained provisions for advisory arbitration. 81 GOV'T EMP. REL. REP. 7522 (1970) (reference file).

19. Aggrieved employees could take their grievances through the grievance procedure established by the agency-employer, or through the grievance procedure negotiated by the agency-employer and the union. Exec. Order No. 10,988, 3 C.F.R. § 521 (1959-1963 Compilation), *reprinted in* 5 U.S.C. § 631 (1964).

20. 3 C.F.R. § 861 (1966-1970 Compilation), *reprinted in* 5 U.S.C. § 7301 (1970).

21. Exec. Order No. 11,491, § 22, 3 C.F.R. § 861 (1966-1970 Compilation), *reprinted in* 5 U.S.C. § 7301 (1970).

gaining agreements, and the parties could file exceptions to the arbitration award with the Federal Labor Relations Council.[22] The Council had discretionary power to grant review of arbitration awards and decisions of the Assistant Secretary of Labor for Labor-Management Relations on grounds similar to those applied by federal courts in private sector labor-management relations.[23]

Executive Order No. 11491 was amended by Executive Order No. 11616 in 1971.[24] Executive Order No. 11616 restricted the negotiated grievance procedure solely to the interpretation or application of the negotiated collective bargaining agreement and excluded from the scope of the negotiated grievance procedure those matters for which statutory appeal procedures existed. In 1975, Executive Order No. 11491 was again amended. Executive Order No. 11838[25] permitted an expansion in the scope and coverage of the parties' negotiated grievance procedures. It allowed the parties to negotiate the coverage and scope of their grievance procedure, provided the procedure negotiated did not conflict with a federal statute or the Order itself. The only matters specifically excluded from the scope of the negotiated grievance procedure were those that were subject to a statutory appeal procedure.

A number of defects in the system developed under amended Executive Order No. 11491 were observed by commentators, federal sector labor organizations, and federal employees. These included: the absence of an independent, impartial decision-making body;[26] the awkward provision requiring submission of unresolved grievability and arbitrability issues and claims that the subject matter of a grievance was covered by a statutory appeal procedure to the Assistant Secretary of Labor for Labor-Manage-

22. *Id.* § 14, adopting the recommendations of the Interagency Study of the Committee on Federal Labor Relations, *Labor-Management Relations in the Federal Service* 42 (1969) *reprinted in* FEDERAL LABOR RELATIONS COUNCIL, LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE (1975).

23. Exec. Order No. 11,491, § 14, 3 C.F.R. § 861 (1966-1970 Compilation), *reprinted in* 5 U.S.C. § 7301 (1970).

24. Exec. Order No. 11,616, 3 C.F.R. § 605 (1971-1975 Compilation). An example of a matter for which a statutory appeal procedure exists is where an employee alleges that he has been discriminated against in violation of equal employment opportunity standards. Civil Rights Act of 1964, 42 U.S.C. § 2000e-16 (Supp. V 1975).

25. Exec. Order No. 11,838, 3 C.F.R. § 957 (1971-1975 Compilation).

26. Porter, *Labor Arbitration in the Federal Government: What Happened to the "Magna Carta?"*, PROC. 30TH ANN. MTG. NAT'L ACAD. ARB. 101 (1978).

ment Relations;[27] the opportunity for appeal of an arbitration award to the Council;[28] the dichotomy between matters subject to negotiated grievance procedures and matters for which statutory appeal procedures existed;[29] the Council's failure to permit employees to invoke arbitration or appeal an adverse arbitration award in cases where the union breached its duty of fair representation to the exclusively represented employees by failing to properly process an employee's grievance;[30] the various points of delay inherent in the Executive Order arbitration scheme;[31] and the unwarranted intervention of the Comptroller General when the legality of a back pay award was challenged by the agency-employer.[32] In addition, the arbitrator's authority to fashion remedies and the arbitration of federal sector labor relations disputes as a whole were procedurally undermined and circumscribed by the appeal decisions of the Federal Labor Relations Council, grievability and arbitrability determinations by the Assistant Secretary of Labor, interpretations of the Back Pay Act by the Comptroller General, and the impact of the Civil Service Commission's regulations and interpretations.[33]

The whole process bore little resemblance to the private sector system and demanded the impossible of even experienced federal sector arbitrators. Less "back-seat driving"[34] was needed so that the intent of the parties, as discerned by experienced arbitrators,

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27. Exec. Order No. 11,491, *as amended*, § 22, *supra* note 2.

28. Porter, *Labor Arbitration in the Federal Government: What Happened to the "Magna Carta?"*, PROC. 30TH ANN. MTG. NAT'L ACAD. ARB. 102 (1978).

29. Exec. Order No. 11,491, *as amended*, § 13(a), *supra* note 2. "It is repeatedly concluded that the present multiplicity of unrelated grievance and appeals channels are too complex, too untidy and overlapping, and too slow in providing resolution of problems." Valdes, *The Expanding Role of the Arbitrator in the Federal Service*, PUB. PERS. ADMIN. 3303 (1978).

30. Exec. Order No. 11,491, *as amended*, § 13(b), *supra* note 2, provides that arbitration may be invoked only by the agency-employer or the exclusive representative. Hence, an employee may not take his grievance to arbitration without the union's or his employer's intervention. *Cf.* Vaca v. Sipes, 386 U.S. 171 (1967).

31. Kagel, *Grievance Arbitration in the Federal Service: How Final and Binding?*, 51 ORE. L. REV. 143 (1971).

32. *Id.* at 148.

33. *See generally* U.S. CIVIL SERVICE COMMISSION, OFFICE OF LABOR-MANAGEMENT RELATIONS, GRIEVANCE ARBITRATION IN THE FEDERAL SERVICE (July 1977).

34. Gamser, *Back-Seat Driving Behind the Back-Seat Driver: Arbitration in the Federal Sector*, PROC. 31ST ANN. MTG. NAT'L ACAD. ARB. 273 (1979). "Less 'back-seat driving' " is analogous to what those in the private sector refer to as deference to arbitration, which is, after all, the forum the parties bargained for and agreed to be bound by. Collyer Insulated Wire, 192 N.L.R.B. 837 (1972); *see* Drake Bakeries, Inc. v. American Bakery Workers Local 50, 370 U.S. 254 (1962). *But cf.* General Am. Transp. Corp., 228 N.L.R.B. 808 (1977); Roy Robinson, Inc., 228 N.L.R.B. 828 (1977).

could be applied to the administration and interpretation of the collective bargaining agreement.[35]

THE CIVIL SERVICE REFORM ACT OF 1978

The Civil Service Reform Act of 1978 mandates a number of things that would normally be achieved only through collective bargaining in the private sector. The Act requires that all collective bargaining agreements in the federal sector must provide for binding arbitration as part of the negotiated grievance procedure.[36] The negotiated grievance procedure must be fair and simple and provide for expeditious processing and the settlement of questions of arbitrability.[37] The Executive Order practice of permitting employees to present their grievances and have them adjusted by the agency-employer without the direct intervention of the exclusive representative, so long as the representative is given the opportunity to be present at the adjustment, is continued.[38]

The Act divests federal sector unions and employees of the right to engage in strikes, work stoppages, slowdowns or picketing of an agency-employer.[39] In the private sector, the agreement not to strike is the principal concession made by the union in exchange for the employer's agreement to arbitrate employee grievances. However, since the Act eliminates the strike threat in the federal sector and requires the agency-employer to provide for grievance arbitration procedures in the collective bargaining agreement, there is no overriding incentive for the agency-employer ever to reach an agreement with the exclusive bargaining representative. By not reaching an agreement and yet fulfilling the statutory duty to negotiate in good faith,[40] the agency-employer forces the union and the employees to process disputes pursuant to statutory appeal procedures. However, statutory ap-

35. Gamser, *Back-Seat Driving Behind the Back-Seat Driver: Arbitration in the Federal Sector*, PROC. 31ST ANN. MTG. NAT'L ACAD. ARB. 273, 281 (1979); Kagel, *Grievance Arbitration in the Federal Service: How Final and Binding?*, 51 ORE. L. REV. 134 (1971).

36. 5 U.S.C.A. § 7121(b)(3)(C) (West Supp. 1979). There is no comparable provision governing private sector labor relations.

37. *Id.* § 7121(b)(1), (2). Under Exec. Order No. 11,491, *as amended*, § 22, *supra* note 2, questions of arbitrability were normally referred to the Assistant Secretary of Labor for Labor-Management Relations for resolution.

38. *Id.* § 7121(b)(3)(B). *Cf.* Exec. Order No. 11,491, *as amended*, § 13(b), *supra* note 2.

39. 5 U.S.C.A. § 7116(a)(7), (b)(7) (West Supp. 1979).

40. *Id.* § 7116(a)(5), (b)(5).

peal procedures are restricted to matters involving adverse agency actions[41] and employment discrimination complaints,[42] and do not cover basic employee grievances. Consequently, a variety of employee grievances can be effectively side-stepped by the agency-employer in the absence of a collective bargaining agreement or an internal agency appeal procedure.

Nevertheless, there are several factors that make it advisable for the federal agency-employer to enter into collective bargaining agreements with federal unions, notwithstanding the resulting compulsion to provide for negotiated grievance arbitration procedures. Once a labor organization has been duly certified as the exclusive bargaining representative, unrest in the work force and a resultant decline in productivity is likely to occur until a collective bargaining agreement is entered into because of the uncertainty of the collective bargaining process. Protracted collective bargaining intensifies unrest in the work force, further diminishing the productivity of the agency, and exposes the agency-employer and the exclusive representative to organizational raiding of the work force by rival labor organizations. While organizational raiding of the work force is primarily the concern of the exclusive representative, continued organizational campaigns create an environment of uncertainty and unrest. Such an environment is antithetical to the productivity and efficiency of the agency.

It is also in the best interest of federal sector labor organizations to enter into collective bargaining agreements with agency-employers. The agreement, if nothing else, assures the union of the right to have federal sector labor relations disputes submitted to arbitration rather than processed through the complicated and time-consuming statutory appeal procedures. In addition, the negotiated grievance arbitration procedure provides a necessary forum for resolution of basic employee grievances.

The Scope of the Negotiated Grievance Arbitration Procedure

Although under the Executive Order the parties ostensibly could determine the scope and coverage of the negotiated grievance procedure, many matters were excluded from the scope of negotiated grievance procedures by the Order itself or by other laws and regulations. Subjects of negotiation which were specifically excluded were those areas of agency discretion which involved the mission of the agency, its budget, its organization, the assignment of personnel, the technology of performing its work,

41. *Id.* § 7121(e).
42. *Id.* § 7121(d).

and internal security practices.[43] Also excluded from the scope and coverage of negotiated grievance procedures were those matters for which statutory appeal procedures existed.[44] As a consequence, some of the most serious employee grievances, involving such matters as removals, suspensions, reductions in grade or pay, and reductions in work force, were exempted. Instead, disputes over these matters went the time-consuming route of the statutory appeal procedure applicable.

The Act expands the scope of matters subject to the negotiated grievance arbitration procedure, including for the first time such adverse actions as demotions, discharges, and long-term suspensions.[45] The negotiated grievance arbitration procedure automatically extends to all matters covered by the Act's broad definition of "grievance"[46] unless the parties specifically agree to exclude certain matters from the coverage of the grievance procedure[47] or the Act itself specifically excludes the matter from the scope of the grievance procedure.[48] Therefore, the onus is on the parties to negotiate matters out from under the coverage of the grievance arbitration procedure, rather than negotiating them into coverage, as is the practice in the private sector.

Among those matters included are: removals or demotions for performance reasons; adverse agency actions such as removals, reductions in grade or pay, and suspensions or furloughs for 30 days or less; grievances concerning the Fair Labor Standards Act; grievances over the withholding of within-grade increases; reductions in work force; and adverse suitability ratings.[49] The only matters specifically excluded by the Act itself are those concerning prohibited political activities, retirement, life insurance, health insurance, suspensions or removals for national security reasons, examinations, certifications or appointments, and the classification of any position which does not result in a reduction

43. Exec. Order No. 11,491, *as amended*, §§ 11(b), 12(b), *supra* note 2.
44. *Id.* § 13(a).
45. 5 U.S.C.A. § 7121(d), (e), (f) (West Supp. 1979). Under Executive Order 11,491, a negotiated grievance arbitration procedure could not cover matters for which a statutory appeal procedure existed, and an arbitrator was precluded from deciding questions that fell within a statutory appeal procedure.
46. *Id.* § 7103(a)(9).
47. *Id.* § 7121(a)(2).
48. *Id.* § 7121(c).
49. Frazier, *Labor-Management Relations in the Federal Government*, 30 LAB. L.J. 131, 137 (1978).

in grade or pay of an employee.[50] Thus, within the broad definition of "grievance," grievance arbitration procedures can potentially extend to a wide variety of labor relations disputes which were, heretofore, within the exclusive province of a statutory appeal procedure.

In most cases, if the parties agree to exclude from the scope of the negotiated grievance procedure a matter already covered by a statutory appeal procedure, that statutory appeal procedure is available to all employees. If matters covered by an existing statutory appeal procedure have not been specifically excluded by the parties from the scope of the negotiated grievance procedure, the negotiated grievance procedure is the sole avenue of appeal available to bargaining unit employees.[51] Cases involving matters such as demotions for unacceptable performance[52] or adverse actions[53] are the exception to these principles. In these cases, the employee may raise the matter under the negotiated grievance procedure, if the procedure covers the matter, or may appeal the matter to the Merit Systems Protection Board (MSPB).[54] However, if the employee chooses to raise the matter under the negotiated grievance procedure and the case results in arbitration, the arbitration award cannot be appealed to the Federal Labor Relations Authority (FLRA), as can other arbitral awards.[55] The matter is instead appealable directly to federal court on the same basis as a MSPB decision.[56]

If the employee alleges employment discrimination as the basis for a grievance and elects to utilize the negotiated grievance procedure, the employee retains the right to request review by either the MSPB or the Equal Employment Opportunity Commission (EEOC) of the "final decision" in the case.[57] This raises the distinct possibility that the employee can secure review by the MSPB or the EEOC not only of orders of the FLRA, but also of final dispositions of the grievance during the course of the negotiated grievance arbitration procedure.[58]

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50. 5 U.S.C.A. § 7121(c) (West Supp. 1979).
51. *Id.* § 7121(a)(1).
52. *Id.* § 4303.
53. *Id.* § 7512.
54. *Id.* § 7121(e)(1).
55. *Id.* § 7122(a).
56. *Id.* § 7121(f).
57. *Id.* § 7121(d).
58. An example of a situation in which a "final decision" may occur is where either the union or the employer decides not to invoke binding arbitration. In addition, the employee may be able to obtain EEOC or MSPB review of the arbitration award since the final and binding arbitration award constitutes a "final decision."

If the grievance concerns a matter which is arguably an unfair labor practice, the employee may raise the matter under the negotiated grievance procedure, if the procedure covers the matter, or may file an unfair labor practice charge with the FLRA.[59] The employee does not have the option of filing unfair labor practice charges with the FLRA for adverse actions taken by the agency-employer or for removals or demotions for performance reasons.[60] The employee has already been given the opportunity to resolve these matters under the negotiated grievance procedure or the applicable statutory appeal procedure.[61] Consequently, "issues which can properly be raised under an appeals procedure may not be raised as an unfair labor practice."[62]

Resolution of Arbitrability and Grievability Issues

"Arbitrability" involves the question of whether a grievance is subject to arbitration under the terms of the particular agreement.[63] A determination that a case is not arbitrable precludes an arbitrator's decision on the merits of a grievance. "Grievability" involves the interrelated question of whether the matter is subject to the particular grievance procedure negotiated by the parties. Grievability may also involve the additional determination of whether the matter is subject to a negotiated grievance procedure or a statutory appeal procedure. A determination that the matter is not grievable will prevent an employee or a labor organization from processing the dispute under the negotiated grievance procedure. A dispute may be grievable and yet not arbitrable, possibly because of an express exclusion of the matter from arbitration by the terms of the negotiated grievance arbitration procedure. The matter must first be found grievable and run the course of the negotiated grievance procedure before the question of arbitrability is ever introduced as an issue. Hence, grievability is a condition precedent to the arbitrability determination.

The Act substantially modifies the procedure for resolving questions of arbitrability and grievability. Prior to enactment of the Act the parties were required to refer questions of arbitrability and grievability to the Assistant Secretary of Labor for

59. 5 U.S.C.A. § 7116(d) (West Supp. 1979).
60. *Id.* §§ 4301, 7501.
61. *Id.* § 7121(e)(1).
62. *Id.* § 7116(d).
63. D. NOLAN, LABOR ARBITRATION LAW AND PRACTICE 62-63 (1979).

Labor-Management Relations,[64] unless the parties had agreed to refer these issues to the arbitrator instead.[65] If the parties were unable to agree whether or not a dispute was subject to a statutory appeal procedure, however, they were required to refer this issue to the Assistant Secretary for decision.[66] The parties could not, either by mutual consent or the abnegation of the Assistant Secretary, submit this issue to the arbitrator for resolution.[67] The Act provides that federal sector arbitrators, like their private sector counterparts,[68] will resolve questions of arbitrability. This is the probable result of the Act's requirement that the negotiated grievance procedure provide for resolution of questions of arbitrability.[69]

As a consequence of the Act's broad definition of grievance[70] and the almost all-inclusive grievance procedure,[71] the resolution of questions of arbitrability by federal sector arbitrators is likely to develop along lines similar, if not identical, to the current private sector practice. Thus, "all doubts are to be resolved in favor of coverage or inclusion absent an express exclusion or the most forceful evidence of a purpose to exclude a claim from arbitration."[72]

Arbitral Considerations of External Law and Principles of Interpretation

The role of the arbitrator in the federal sector differs substantially from that of the private sector arbitrator. The Act provides that if upon review of an arbitration award the FLRA finds the award deficient because it is contrary to any law, rule or regulation, the FLRA is empowered to modify the award to the extent it deems necessary and that is consistent with applicable laws,

64. Exec. Order No. 11,491, *as amended*, §§ 6(a)(5), 13(d), *supra* note 2, adopting the Report and Recommendations of the Federal Labor Relations Council on the Amendment of Executive Order No. 11,491, *as amended* (1975), *reprinted in* FEDERAL LABOR RELATIONS COUNCIL, LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE 57 (1975).

65. *See* Exec. Order No. 11,616, § 8, 3 C.F.R. § 605 (1971-1975 Compilation), *amending* Exec. Order No. 11,491, § 13(d), 3 C.F.R. § 861 (1966-1970 Compilation), *reprinted in* 5 U.S.C. § 7301 (1970).

66. Exec. Order No. 11,491, *as amended*, § 22, *supra* note 2.

67. Frazier, *Labor Arbitration in the Federal Service*, 45 GEO. WASH. L. REV. 712, 753 (1977).

68. *See generally* Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 364 (1960). These three cases are popularly referred to as "the Steelworkers Trilogy."

69. 5 U.S.C.A. § 7121(a)(1) (West Supp. 1979).

70. *Id.* § 7103(a)(9).

71. *Id.* § 7121(a)(2), (c).

72. Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 583 (1960).

rules or regulations.[73] Hence, an arbitrator's consideration of external law[74] is compulsory and always within the proper scope of the arbitrator's authority in the federal sector. This contrasts with the private sector practice where an arbitrator who bases his award on an extrinsic statutory policy exceeds his arbitral authority and exposes his award to appellate attack.[75] The reason for this difference is the existence of a multitude of federal laws, rules and regulations which governs nearly every aspect of the federal sector employment relationship and establishes the basic conditions of federal employment by statute.[76] Thus, there are fewer opportunities to negotiate over policy issues than would be the normal fare for collective bargaining in the private sector.[77]

Since the federal sector arbitrator must examine both the language of the collective bargaining agreement and any applicable external law, problems of interpretation and the authoritative effect of the arbitrator's interpretation of applicable external law arise. If the provisions of the contract and external law overlap but are not necessarily in conflict, "most arbitrators would agree that . . . an arbitrator could probably look to the [external law] as an interpetative aid of the contract, and hence may rule on questions of [external law] that arise in connection with a contractual grievance."[78] However, it is unclear what approach the arbitrator should adopt if the provisions of the collective bargaining agreement and those of the external law appear to be in conflict. It is an essential principle of arbitral interpretation that "an interpretation that would bring the contract into conflict with positive law is to be avoided."[79] This principle rests on the presumption that the parties intended their provisions to conform to law. Given this sound premise, the arbitrator may reasonably assume that the parties intended the lawful interpretation.

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73. 5 U.S.C.A. § 7122(a) (West Supp. 1979).

74. "External law" refers to laws, rules and regulations not specifically incorporated in the collective bargaining agreement.

75. *See* Alexander v. Gardner-Denver, 415 U.S. 36 (1974); Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

76. The conditions of employment which have been established pursuant to Title V of U.S.C., 80 Stat. 378 (1970), constitute a comprehensive package of benefits preempting collective bargaining over such matters as wages, hours of work, insurance, leave, retention, and a variety of other basic conditions of employment.

77. Weber, *Federal Labor Relations: Problems and Prospectus*, PROC. 24TH ANN. MTG. NAT'L ACAD. ARB. 148 (1971).

78. D. NOLAN, LABOR ARBITRATION LAW AND PRACTICE 72 (1979).

79. *Id.* at 166.

The question of what authoritative weight should be accorded the arbitrator's interpretation of external law by a reviewing court or agency remains to be resolved. In *Alexander v. Gardner-Denver*[80] the Supreme Court of the United States was afforded the opportunity to consider the problem. The Court refused to adopt any standards to guide appellate review of an arbitral interpretation of external law, concluding that such a determination was within the province of the reviewing court in considering the facts and circumstances of each case.[81] Nevertheless, in dicta, the Supreme Court set forth a number of relevant factors which reviewing courts should consider in evaluating an arbitration award interpreting external law. These factors are:

(1) The existence of provisions in the collective bargaining agreement which conform substantially to external law;
(2) The degree of procedural fairness in the arbitral forum;
(3) The adequacy of the record with respect to the issue which overlaps external law; and
(4) The special competence of particular arbitrators.[82]

If these factors are met and the arbitral determination gives full consideration to an employee's external law rights, a reviewing court may properly accord the arbitrator's interpretation great weight.[83]

Whether the arbitrator's interpretation of external law is only advisory and subject to de novo review or should be binding as between the parties is debatable.[84] The Act requires federal sector arbitrators to consider and interpret external law in the course of resolving federal sector labor relations disputes and to make their awards consistent with such applicable external law.[85] This demands a greater degree of arbitral expertise and the utilization of resources alien to the private sector experience and conditioning of most arbitrators. An increased reliance on the parties for the sources of applicable external law will result. As long as the arbitrator observes the factors indicated by the Supreme Court in *Alexander v. Gardner-Denver* and considers and implements applicable external law in reaching his decision, his interpretation of external law should be binding as between the parties.

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80. 415 U.S. 36 (1974).
81. *Id.* at 60 n.21.
82. *Id.*
83. *Id.*
84. "Some arbitrators argue that an arbitrator's ruling is only advisory, subject to *de novo* review if the parties seek enforcement or vacation of the award . . . because such legal issues are outside the arbitrator's authority and expertise. Others have argued that his interpretation should be binding between the parties." D. NOLAN, LABOR ARBITRATION LAW AND PRACTICE 73 (1979).
85. 5 U.S.C.A. § 7122(a)(1) (West Supp. 1979).

Grounds for Exception to the Arbitration Award

The Act authorizes the FLRA to resolve exceptions to arbitration awards.[86] The FLRA has announced that it plans to abandon the two-step procedure used by the Council in reviewing arbitration awards[87] in favor of a single-step procedure designed to expedite the resolution of arbitrability appeals.[88] Therefore, upon receipt of a petition averring one or more grounds for reviewing an arbitration award, the FLRA will proceed directly to address the merits of the exceptions to the arbitration award. The FLRA Interim Regulations[89] require not only that one or more grounds for review must be presented, but also that the petition contain evidence or rulings bearing on the issues before the FLRA, contain arguments and authorities in support of the stated grounds, and be accompanied by a legible copy of the award.[90]

To ensure that arbitration awards are consistent with applicable laws, rules and regulations, the Act permits the FLRA to grant review of an arbitration award if it is alleged that the award is deficient because it is contrary to any law, rule or regulation.[91] These grounds are known as the "federal sector grounds"[92] because they recognize the extensive body of federal statutes and regulations affecting the federal sector employment relationship.

86. *Id.* §§ 7105(a)(2)(H), 7122(a). *Accord*, Exec. Order No. 11,491, *as amended*, § 14, *supra* note 2.

87. The Council's two-step procedure of arbitral review involved an initial determination of whether or not to accept the petition for review based upon the sufficiency of the facts and circumstances presented in the petition. This determination was followed by an independent determination by the Council of the merits of the grounds alleged, based upon the sufficiency of the arguments of the parties at a hearing before the Council, and perhaps the interpretation of an appropriate regulation by the issuing administrative authority, when requested. 5 C.F.R. §§ 2411.32, .36, .37 (1978); Frazier, *supra* note 67, at 718-19. However, note that acceptance of the petition for review did not necessarily mean that the Council would modify, set aside, or remand the arbitration award. *See, e.g.*, U.S. Marine Corps Supply Center, Rep. No. 122, F.L.R.C. No. 75A-98 (March 8, 1977); F.L.R.C. INFORMATION ANNOUNCEMENT (July 2, 1976).

88. Address by Ronald W. Haughton, Chairman of the FLRA, Washington, D.C. (March 29-30, 1979), *reprinted in pertinent part in* GOV'T EMP. REL. REP. 806:6 (April 16, 1979).

89. 5 C.F.R. § 2400 (1979), *reprinted in* GOV'T EMP. REL. REP. 822: Special Supplement (August 6, 1979).

90. 5 C.F.R. § 2425.2 (1979).

91. 5 U.S.C.A. § 7122(a)(1) (West Supp. 1979); *accord*, F.L.R.A. INTERIM RULES AND REGULATIONS, 5 C.F.R. § 2425.4(a)(1) (1979).

92. Gamser, *Back-Seat Driving Behind the Back-Seat Driver: Arbitration in the Federal Sector*, PROC. 31ST ANN. MTG. NAT'L ACAD. ARB. 273 (1979).

As an additional basis for securing review of an arbitration award, the Act specifies "other grounds similar to those applied by federal courts in private sector labor-management relations."[93]

The Federal Sector Grounds

The Executive Order provided that only those challenges based on government-wide regulations promulgated by the Civil Service Commission or by some other central regulatory agency could be the basis for a challenge to an arbitration award.[94] The Act does not expressly indicate what is meant by a "regulation" for purposes of filing an exception to an arbitration award. However, Congress adopted language identical to that of the Executive Order, thus indicating an intent not to change the meaning of the term "regulation" for purposes of stating a ground for exception to an arbitration award.

Upon acceptance of a petition for review of an arbitration award based upon the claim that the award violated an appropriate law, rule or regulation, the Council often requested an interpretation of the law, rule or regulation involved from the issuing agency and the basis for that interpretation.[95] The FLRA is similarly empowered to request an advisory interpretation from the issuing agency, such as the Office of Personnel Management, concerning the proper interpretation of rules, regulations or policy directives that affect or are affected by the arbitration award.[96] If, according to the interpretation of the issuing agency, the award is violative of an appropriate law, rule or regulation, the FLRA may modify or set aside the award accordingly.[97]

An agency-employer's internal regulations were not considered

93. 5 U.S.C.A. § 7122(a)(2) (West Supp. 1979); *accord*, F.L.R.A. INTERIM RULES & REGULATIONS, 5 C.F.R. § 2425.4(a)(2) (1979).

94. Indiana Army Ammunition Plant & N.F.F.E., Rep. No. 92, F.L.R.C. No. 75A-84 (November 28, 1975); Valdes, *The Expanding Role of the Arbitrator in the Federal Service*, PUB. PERS. ADMIN. 3306 (1978). The Council held that the Civil Service Commission regulations found in the Federal Personnel Manual were appropriate regulations within the meaning of the Council's rules. *See, e.g.*, Francis E. Warren Air Force Base & A.F.G.E. Local 2354, Rep. No. 114, F.L.R.C. No. 75A-127 (September 30, 1976). The Civil Service Reform Act of 1978 appears to have absorbed this ground, requiring appropriate rules and regulations to be government-wide in order to be precluded from the scope of negotiations. *See* 5 U.S.C.A. § 7117(a)(1) (West Supp. 1979).

95. U.S. CIVIL SERVICE COMMISSION, OFFICE OF LABOR-MANAGEMENT RELATIONS, GRIEVANCE ARBITRATION IN THE FEDERAL SERVICE 3 (July 1977).

96. 5 U.S.C.A. § 7122(a) (West Supp. 1979); *accord*, F.L.R.A. INTERIM RULES & REGULATIONS, 5 C.F.R. § 2425.4(a)(1) (1979).

97. Francis E. Warren Air Force Base & A.F.G.E. Local 2354, Rep. No. 114, F.L.R.C. No. 75A-127 (September 30, 1976); Gamser, *Back-Seat Driving Behind The Back-Seat Driver: Arbitration in the Federal Sector*, PROC. 31ST ANN. MTG. NAT'L ACAD. ARB. 273, 275 (1979).

"appropriate regulations" for purposes of establishing a ground for review of an arbitration award.[98] Disputes based on these regulations were, therefore, subject to final and binding arbitration whether or not the regulations were incorporated in the collective bargaining agreement,[99] as long as they were not excluded from the arbitrator's authority by an express provision in the collective bargaining agreement.[100] These principles remain valid in the federal sector because the Act adopts the identical language of the Executive Order.

The arbitrator's failure to decide whether an agency-employer committed an unfair labor practice in violation of section 19 of the Executive Order[101] was not considered a ground upon which a petition for review of an arbitration award would be granted. The Act retains this identical provision, which recognizes that the procedures for resolving unfair labor practice charges and the negotiated grievance arbitration procedures are mutually exclusive.[102]

If the conduct complained of constituted a violation of both the Executive Order and the terms of the collective bargaining agreement, section 19 of the Order provided that the matter could be raised under either the negotiated grievance procedure or the unfair labor practice procedure of the Order. Once raised under one procedure, however, the matter could not thereafter be brought under the other procedure.[103] The Act continues this practice, requiring the party to make an irrevocable election of forum.[104] Requiring the employee to elect the procedure within which to bring his dispute differs from the private sector approach of the National Labor Relations Board (NLRB). The NLRB defers exercising its unfair labor practice jurisdiction if the matter can be

98. *See* F.A.A. & P.A.T.C.O., Rep. No. 88, F.L.R.C. No. 74A-88 (July 24, 1975); F.L.R.C. INFORMATION ANNOUNCEMENT 7-8 (July 2, 1976); Gamser, *Back-Seat Driving Behind the Back-Seat Driver: Arbitration in the Federal Sector*, PROC. 31ST ANN. MTG. NAT'L ACAD. ARB. 273, 276 (1979).

99. U.S. CIVIL SERVICE COMMISSION, OFFICE OF LABOR-MANAGEMENT RELATIONS, GRIEVANCE ARBITRATION IN THE FEDERAL SERVICE 5 (July 1977). The Civil Service Commission observes that a "careful review of Council decisions on appeals of arbitration awards reveals that the Council has never set aside or modified an arbitration award solely on the grounds that an arbitrator misinterpreted an agency regulation which was properly before him." *Id.*

100. F.A.A. & P.A.T.C.O., Rep. No. 88, F.L.R.C. No. 74A-88 (July 24, 1975).

101. *See* F.L.R.C. INFORMATION ANNOUNCEMENT 9 (July 2, 1976).

102. 5 U.S.C.A. § 7116(d) (West Supp. 1979).

103. Exec. Order No. 11,491, *as amended*, § 19(d), *supra* note 2.

104. 5 U.S.C.A. § 7116(d) (West Supp. 1979).

resolved under the parties' negotiated grievance arbitration procedure. However, the NLRB retains limited jurisdiction to ensure that the arbitrator promptly resolves the dispute and yields a result that is not repugnant to the National Labor Relations Act.[105]

The Private Sector Grounds

The Act,[106] like the Executive Order, speaks of grounds "similar to those applied by federal courts in the private sector,"[107] not of grounds identical to those applied by federal courts in the private sector. Because of this terminology, the Council was free to recognize those private sector grounds which it found appealing. Moreover, the Council had discretionary authority to modify any of the private sector grounds it chose to implement. However, the Council integrated the entire spectrum of grounds applied by federal courts in the private sector into the federal service labor-management relations system with one notable exception.[108] A similar approach by the FLRA should ensue because of the nearly identical language found in the Act, mandating the FLRA to recognize grounds similar to those applied by federal courts in private sector labor-management relations.

At least six grounds were recognized by the Council under the rubric of private sector grounds: (1) The arbitrator exceeded his authority by deciding an issue not included in the question(s) submitted to arbitration or by exceeding an explicit limitation on his authority to render an award;[109] (2) the award does not draw its essence from the collective bargaining agreement;[110] (3) the award is incomplete, ambiguous or contradictory so as to make implementation of the award impossible; (4) the award is based on a non-fact, *i.e.*, "the central fact underlying the award is concededly erroneous and in fact a gross mistake of fact but for

105. *See* Collyer Insulated Wire, 192 N.L.R.B. 837 (1971). *But cf.* General Am. Transp. Corp., 228 N.L.R.B. 808 (1977); Roy Robinson, Inc., 228 N.L.R.B. 828 (1977).

106. 5 U.S.C.A. § 7122(a)(2) (West Supp. 1979).

107. Frazier, *supra* note 67, at 719.

108. *See* U.S. CIVIL SERVICE COMMISSION, OFFICE OF LABOR-MANAGEMENT RELATIONS, GRIEVANCE ARBITRATION IN THE FEDERAL SERVICE 9-12 (July 1977). Breach of the union's duty of fair representation was the exception to the general practice of the Council. *See* Vaca v. Sipes, 386 U.S. 171 (1967); *see also* Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1974).

109. F.L.R.C. INFORMATION ANNOUNCEMENT 9-10 (July 2, 1976). *Accord*, Electrical Workers Local 278 v. Jetero Corp., 496 F.2d 661 (5th Cir. 1971); Magnavox Corp. v. IUE, 410 F.2d 388 (6th Cir. 1969).

110. F.L.R.C. INFORMATION ANNOUNCEMENT 9-11 (July 2, 1976). *Accord*, Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960), a private sector case which sketched the limits of judicial deference to arbitration awards by announcing that in order to be enforceable an arbitration award must draw its essence from the collective bargaining agreement.

which a different result would have been reached";[111] (5) the arbitrator was biased or partial; and (6) the arbitrator refused to hear pertinent and material evidence.[112] In addition, the Council adopted the private sector principle prohibiting enforcement of an award requiring a party to perform an illegal act.[113]

Unfortunately, if the exclusive representative breached its duty of fair representation by wrongfully failing to process or refusing to process, or negligently processing an employee grievance,[114] the aggrieved federal employee was not permitted to invoke the arbitration machinery without the assistance of the exclusive representative, or to contest the arbitration award in federal court. This was contrary to the private sector practice which not only permits such recourse by the aggrieved employee,[115] but also subjects the union to a damage award under the provisions of the National Labor Relations Act.[116] The FLRA possesses the statutory authority to transcend the Council's reluctance to integrate breach of duty of fair representation into the federal sector as a basis for finding an arbitration award deficient on private sector grounds.[117] The FLRA should adopt the sound approach taken in the private sector and recognize breach of duty of fair representa-

111. F.L.R.C. INFORMATION ANNOUNCEMENT 12 (July 2, 1976).

112. *Id.* at 9-12.

113. *See* Office of Economic Opportunity, Rep. No. 95, F.L.R.C. No. 75A-23 (December 31, 1975), in which the arbitrator directed the agency-employer to pay punitive damages, which were not available as a remedy under Executive Order 11,491. *Accord*, Glendale Mfg. Co. v. ILGWU Local 520, 283 F.2d 936, 940 (4th Cir. 1960).

114. There exists a conflict among the circuits as to whether a duty of fair representation case can be predicated on the negligence of the union in processing an employee's grievance. *See* Milstead v. Teamsters Local 957, 580 F.2d 232 (6th Cir. 1978) (inept handling of a grievance held to warrant breach of duty of fair representation); Connally v. Transcon Lines, 583 F.2d 199 (5th Cir. 1978) (under some circumstances negligence might breach the duty); Robesky v. Quantas Empire Airways, 573 F.2d 1082 (9th Cir. 1978) (rejecting negligence as a basis for breach of the duty unless so egregious and arbitrary as to amount to a reckless disregard for the rights of the individual); Coe v. Rubber Workers, 571 F.2d 1349 (5th Cir. 1978) (rejecting negligence as a basis for breach of the duty). The NLRB has consistently held that negligent action or inaction of a union by itself is insufficient to constitute a breach of the duty of fair representation. *See* Truck Drivers Local 692, 202 N.L.R.B. 446 (1974); NLRB General Counsel Memorandum 79-55 (1979) (explaining his position regarding issuance of complaints in fair representation cases predicated on negligence).

115. *See* Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976); Vaca v. Sipes, 386 U.S. 171 (1967).

116. National Labor Relations Act § 301, 29 U.S.C. § 185 (1970).

117. 5 U.S.C.A. § 7122(a)(2) (West Supp. 1979).

tion as an additional private sector ground for filing an exception to an arbitration award and permit aggrieved federal employees to invoke the negotiated grievance arbitration procedure in such cases.

In the private sector, a party may challenge an arbitration award based upon any of the aforementioned grounds, but may not, as a practical matter, challenge the reasoning of the arbitrator's opinion. It is the arbitrator's interpretation that the parties have bargained for and by which they have agreed to be bound.[118] The Council adopted this principle of deference to arbitration awards and resolved to uphold awards unless they were "so palpably faulty that no judge or group of judges could ever conceivably have made such a ruling," and the award could not "in any rational way be derived from the agreement."[119] Consequently, an arbitrator's alleged misinterpretation of an agreement was rarely grounds for Council review of an arbitration award.[120] The limited review mandate of the FLRA is identical to that of the Council. The FLRA determines whether the arbitrator considered the proper sources in resolving the grievance, but does not determine whether the arbitrator resolved the grievance correctly.[121] Consequently, as FLRA member Frazier recently declared, "just as the Council adhered strictly to its mandate, so will the FLRA. It will not relitigate a grievance on its merits."[122]

Post-Arbitration Review and Enforcement

Arbitration decisions are appealable to the FLRA on the same bases as they were formerly appealable to the Council. While fourteen percent of all federal sector awards are appealed, as compared to one-half percent of all private sector awards,[123] only

118. Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 364 (1960).

119. N.A.G.E. Local R8-14 & F.A.A., Oklahoma City, Oklahoma, Rep. No. 79, F.L.R.C. No. 74A-38 (July 30, 1975); F.L.R.C. INFORMATION ANNOUNCEMENT 11 (July 2, 1976).

120. Frazier, *supra* note 67, at 744. *See, e.g.*, Automated Logistics Management Systems Agency, Rep. No. 115, F.L.R.C. No. 76A-69 (Nov. 5, 1976); Dep't Air Force, Scott Air Force Base, Rep. No. 96, F.L.R.C. No. 75A-101 (January 30, 1976); *accord*, Holly Sugar Corp. v. Distillery Workers, 412 F.2d 899 (9th Cir. 1969); Ludwig Honold Mfg. Co. v. Fletcher, 405 F.2d 1123 (3d Cir. 1969); Safeway Stores v. Bakery Workers Local 111, 390 F.2d 79 (5th Cir. 1968). *See generally* GORMAN, BASIC TEXT ON LABOR LAW 585 (1976).

121. Remarks of Henry B. Frazier, III, Member, FLRA, *Organization and Function of Federal Sector Dispute Resolution Machinery Under The Civil Service Reform Act of 1978*, before the Federal Personnel Associations of New York and New Jersey (May 19, 1979).

122. *Id.*

123. Address by Ronald W. Haughton, Chairman, FLRA, *Federal Sector Labor*

one percent of all federal sector awards have been set aside in their entirety and only two percent have required modification.[124] The percentage of affirmance of appealed federal sector arbitration awards is impressive considering the multitude of federal laws and regulations which impinge upon the arbitration process in the federal sector, and the private sector conditioning of most federal sector arbitrators.

The Act provides that decisions of the FLRA concerning arbitration awards are final and exempt from judicial review except as to constitutional issues[125] or where the final order of the FLRA involves an unfair labor practice.[126] Permitting judicial review of final orders of the FLRA involving unfair labor practices presents a troublesome issue when enforcement of the arbitration award becomes necessary. The Deputy Director of Labor Relations for the Department of Defense has argued that the statutory exception to the general rule precluding judicial review of arbitration awards refers to more than mere refusals to arbitrate or abide by an arbitration award.[127] He argues that refusing to arbitrate a grievance or abide by an arbitration award constitutes a violation of the parties' bargaining obligation. Since this would be an unfair labor practice in any event, it is consequently not sufficient grounds for affording judicial review of an arbitration award.[128] Although the FLRA's order in the unfair labor practice proceeding would clearly constitute a judicially reviewable "order of the Authority,"[129] the FLRA will have to determine whether a petition for judicial enforcement of an arbitration award can be consid-

Relations: An Overview After Four Months Under Title VII, at a meeting of the Society of Federal Labor Relations Professionals, Pacific Southwest Chapter (May 1, 1979).

124. Remarks by Henry B. Frazier, III, Member, FLRA, *Arbitration in the Federal Sector*, before the Department of the Navy, Office of the General Counsel (March 19, 1979).

125. 5 U.S.C.A. § 7702 (West Supp. 1979); *see also* Alexander v. Gardner-Denver, 415 U.S. 36 (1974) (affording judicial review of grievances involving potential cause of action for employment discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16(c) (1970)).

126. 5 U.S.C.A. § 7123(a)(1) (West Supp. 1979). There is no counterpart to the Civil Service Reform Act's exception to the general rule prohibiting judicial review of arbitration awards in the National Labor Relations Act, which is supposed to be the model in this area.

127. Remarks of Stuart M. Foss, Deputy Director of Labor Relations, Department of Defense, before the Federal Bar Association's Conference on Labor Relations in the Federal Service (1979).

128. 5 U.S.C.A. § 7116(a)(5), (b)(5) (West Supp. 1979).

129. *Id.*

ered prior to the filing of an unfair labor practice charge.[130]

Under the Executive Order, there were no sure means of forcing a recalcitrant party to submit to arbitration or to enforce an arbitration award.[131] In fact, the Council held that the Executive Order did not contemplate enforcement of arbitration awards as part of its function of considering exceptions to arbitration awards.[132] This approach differs from that of the private sector. In the private sector, the parties can go to a single court for either an order to set aside an arbitration award, or for an order enforcing the award, thus providing concurrent resolution of both issues.[133] The federal courts, however, have held that enforcement of federal employee rights flowing from the Executive Order was a matter best left to the executive branch, and not to the judiciary.[134] However, "the courts will intervene when denials of constitutional rights are at issue."[135] Also, since the Executive Order has been superceded by the Act, increased judicial intervention on behalf of aggrieved federal employees is now possible.

The correct procedure to secure compliance with a final and binding arbitration award remains anything but clear. The FLRA Interim Regulations[136] require that unfair labor practice charges based on the failure of a party to comply with an arbitration award be given priority over all other cases in the FLRA Regional Office where such charges are filed.[137] Requiring the employee or the union to resort to the unfair labor practice forum to secure enforcement of a final and binding arbitration award constitutes a waste of that forum's valuable time and permits the agency-employer to ignore the arbitration award which the Act decrees to be final and binding on the agency-employer. Such conduct by the agency-employer should be discouraged rather than invited. Therefore, the FLRA should strive to provide prompt resolution of

130. *See* GOV'T EMP. REL. REP. 805:6 (April 9, 1979) reporting on A.F.G.E. Local 1662 & United States Army Communications Command, Fort Huachuca, Arizona.

131. Kagel, *Grievance Arbitration in the Federal Service: How Final and Binding?*, 51 ORE. L. REV. 134 (1971).

132. Department Army, Aberdeen Proving Grounds, Rep. No. 67, F.L.R.C. No. 74A-46 (March 20, 1975).

133. *See* National Labor Relations Act § 301, 29 U.S.C. § 185 (1970). Frazier, *supra* note 67, at 755, criticized the federal sector practice of enforcing arbitration awards under Exec. Order 11,491, urging it to be replaced by the private sector practice in order to provide faster resolution of enforcement issues.

134. *See, e.g.*, Manhattan-Bronx Postal Union v. Gronouski, 350 F.2d 451 (D.C. Cir. 1965), *cert. denied*, 382 U.S. 978 (1966).

135. Porter, *Labor Arbitration in the Federal Government: What Happened to the "Magna Carta?"*, PROC. 30TH ANN. MTG. NAT'L ACAD. ARB. 97 (1978).

136. 5 C.F.R. § 2400 (1979).

137. *Id.* § 2423.6(d).

arbitration award appeals in order to expedite enforcement of final and binding arbitration awards.

Arbitral Intervention by the Comptroller General

In order to correct a major deficiency of the Executive Order, namely that arbitrators were unable to provide meaningful "make whole remedies," Congress amended the Back Pay Act.[138] Federal sector arbitrators may now award back pay and attorneys' fees and provide other corrective action to remedy a grievance.[139] The Civil Service Reform Act of 1978 does not expressly make any changes in the Back Pay Act's requirement that, before a back pay award can be made, the arbitrator must make three preliminary findings. The arbitrator must find that:

(1) The employee has undergone an unjustified personnel action in violation of an otherwise valid mandatory provision in a collective bargaining agreement;
(2) Such action resulted in a withdrawal of pay, allowances or differentials, as defined by applicable Civil Service Commission regulations; and
(3) "But for" the wrongful action, the withdrawal of pay, allowances or differentials would not have occurred.[140]

This "but for" finding is crucial to the validity of the back pay award because in the absence of such a finding the Comptroller General will strike the back pay award.[141]

While federal courts usually refused to intervene in the administration of the Executive Order, the Comptroller General, as guardian of the federal purse,[142] was all too willing to do so if monetary awards were included in the arbitration award. Under existing federal law, individual disbursing officers who make payments that are not lawfully authorized may incur personal liabil-

138. 5 U.S.C. § 5596(b) (1970). "Make whole remedies" refers to such remedies as monetary awards or promotion orders, which are designed to "make whole" the employee for the loss of benefits, wages, etc., proximately resulting from the wrongful conduct of the employer.

139. 5 U.S.C.A. § 702 (West Supp. 1979), *amending* 5 U.S.C. § 5596(b)(1)(A)(i), (ii) (1970).

140. Gamser, *Back-Seat Driving Behind the Back-Seat Driver: Arbitration in the Federal Sector*, PROC. 31ST ANN. MTG. NAT'L ACAD. ARB. 273, 277 (1979).

141. UNITED STATES GOVERNMENT ACCOUNTING OFFICE, MANUAL ON REMEDIES AVAILABLE TO THIRD-PARTIES IN ADJUDICATING FEDERAL EMPLOYEE GRIEVANCES App. III (1977).

142. 5 U.S.C. § 41 (1970).

ity for the amounts improperly disbursed.[143] The prospect of personal liability had a chilling effect on the payment of questionable monies by disbursing officers pursuant to an arbitration award. When in doubt about the authority to make a particular payment in accordance with an arbitration award, the disbursing officer could request an advance decision from the Comptroller General as to the legality of the proposed disbursement.[144] As stated by one commentator: "Not surprisingly, this provision of the law was seized upon by agencies as a means of challenging and frequently reversing adverse arbitration awards involving monetary awards."[145]

The problem of intervention by the Comptroller General in the federal sector arbitration process led the Council to advise the parties to file exceptions to arbitration awards promptly with the Council, so that the Council might secure the Comptroller General's advice as to whether the award could be complied with.[146] Nevertheless, the Comptroller General's position under the Executive Order was that, whether or not the agency-employer filed an exception to the arbitration award with the Council, the agency-employer had the unqualified right to request a binding decision of the Comptroller General regarding the lawful expenditure of government funds. It is unclear whether the Act affects the Comptroller General's power in this area. By providing a statutory foundation for federal sector arbitration awards, the Act should serve to discourage such unauthorized appeals to the Comptroller General. Nevertheless, the Act is silent on this problem, requiring the FLRA to take a firm stance against the Comptroller General's intervention.[147]

Processing Federal Sector Labor Relations Disputes Under the Act

The Act permits the exclusive representative or the agency-employer to invoke binding arbitration of federal sector labor relations disputes.[148] The federal employee may not invoke binding arbitration of matters that were not satisfactorily settled under the negotiated grievance arbitration procedure without the assistance of the exclusive representative or the agency-employer. This

143. 31 U.S.C. §§ 82(a)(1), (2)(B), 506, 508, 510-511, 514, 516, (1970).
144. 5 U.S.C. § 74 (1970).
145. Porter, *Labor Arbitration in the Federal Government: What Happened to the "Magna Carta?"*, PROC. 30TH ANN. MTG. NAT'L ACAD. ARB. 98 (1978).
146. Dep't Army, Aberdeen Proving Grounds, Rep. No. 67, F.L.R.C. No. 74A-46 (March 20, 1975); GOV'T EMP. REL. REP. 638:A-14 (January 14, 1976).
147. 54 Comp. Gen. 921, 927 (1975).
148. 5 U.S.C.A. § 7121(b)(3)(C) (West Supp. 1979).

is one of the major deficiencies of the Act. If the employee elects to bring the matter under the negotiated grievance procedure, the matter is not satisfactorily settled under that procedure, and neither the exclusive representative nor the agency-employer chooses to invoke binding arbitration, the employee's grievance is left unresolved.[149]

Under the Act, four different types of federal sector labor relations disputes are discernible, and each entails its own uniquely complex processing machinery. The four types of disputes are pure grievance cases, pure discrimination cases, mixed cases, and removal, demotion and suspension cases.

Pure Grievance Cases

A "pure grievance" is a grievance which does not involve any of the following circumstances: a reduction in grade or removal for unacceptable performance; a removal, suspension for more than 14 days, reduction in grade or pay, or furlough of 30 days or less; or a complaint of discrimination.[150] Diagram 1 illustrates the general procedure for processing pure grievance cases.[151]

First, the employee or exclusive representative must file a grievance with the agency-employer pursuant to the terms of the negotiated grievance procedure,[152] provided the matter has not been specifically excluded from the scope of the negotiated grievance procedure by the terms of the parties' collective bargaining agreement or by the Act.[153] If the matter has not been excluded, the negotiated grievance procedure is the exclusive procedure available to the bargaining unit employees for resolving pure grievances.[154] If the matter has been excluded, then it is not properly grievable and must instead be submitted pursuant to an applicable statutory appeal procedure.

If the matter has not been excluded from the scope of the negotiated grievance procedure and is not satisfactorily settled there-

149. Cases involving claims of employment discrimination are exceptions to this proposition since the employee in such cases is not required to make an irrevocable election of forum. *See* 5 U.S.C.A. § 7121(d), (e) (West Supp. 1979).

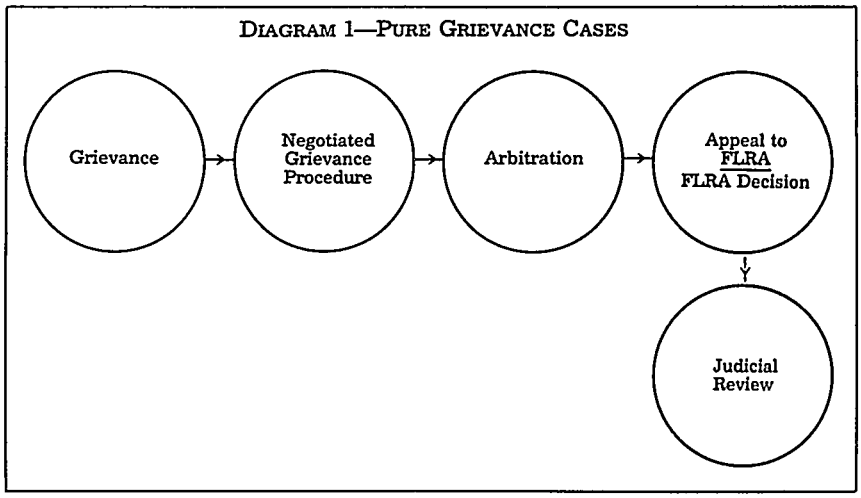
150. C. Brian Harris, Chief, Arbitration Division, Federal Labor Relations Authority (FLRA), *Diagram on Processing Federal Sector Labor Relations Disputes* (1979) (hereinafter cited as *Diagram*).

151. Adapted from *Diagram, supra* note 150.

152. 5 U.S.C.A. § 7121(b)(3)(A), (B) (West Supp. 1979).

153. *Id.* § 7121(a)(2), (c).

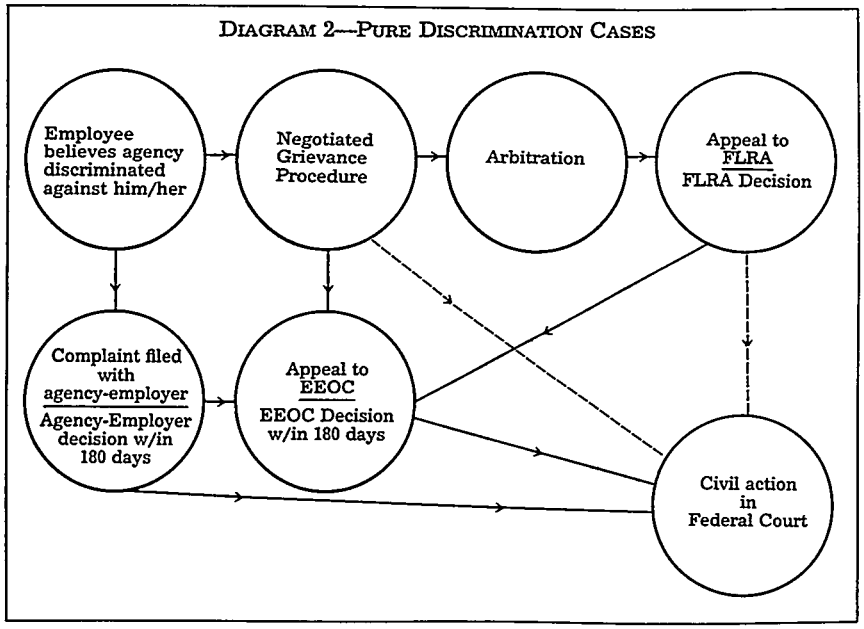
154. *Id.* § 7121(a)(1).



under, either the exclusive representative or the agency-employer may invoke binding arbitration.[155] The parties then present their respective positions regarding the grievance and their interpretations of the relevant provisions of the collective bargaining agreement, and advise the arbitrator of any applicable external law at the arbitration hearing. Based on the evidence presented, the arbitrator makes a decision and fashions an appropriate award. Either party to the arbitration may then file exceptions to the arbitration award with the FLRA.[156] If no exceptions are filed within thirty days from the date of the award, the award becomes final and binding on the parties.[157]

If one of the parties files an exception to the award with the FLRA, the FLRA will consider the merits of the grounds alleged.[158] If the FLRA finds the award deficient because it is contrary to external law or on other grounds similar to those applied by federal courts in private sector labor-management relations, the FLRA may "take such action and make such recommendations concerning the award as it deems necessary, consistent with applicable rules, law or regulations."[159] The final order of the FLRA in pure grievance cases is precisely that—final.[160] Judicial review of the FLRA's final order is available only if it involves an unfair labor practice charge.[161]

155. *Id.* § 7121(b)(3)(C).
156. *Id.* § 7122(a).
157. *Id.* § 7122(b).
158. *Id.* § 7122(a).
159. *Id.*
160. *Id.* § 7122(b).
161. *Id.* § 7123(a).



Pure Discrimination Cases

A "pure discrimination case" is one in which the sole allegation is that the employee has been discriminated against by the agency-employer.[162] Diagram 2 illustrates the general procedure for processing pure discrimination cases.[163]

A complaint of discrimination[164] may be raised under either the negotiated grievance procedure, if the procedure contains a non-discrimination clause, or the statutory appeal procedure.[165] The employee makes an irrevocable election of forum by timely initiating an action under the applicable statutory appeal procedure or by filing a timely grievance in writing under the provisions of the negotiated grievance procedure.[166] If the employee elects to file an employment discrimination complaint with the Merit Systems Protection Board (MSPB), thereby invoking the statutory appeal procedure machinery, the matter must be decided within

162. *Diagram, supra* note 150.
163. Adapted from *Diagram, supra* note 150.
164. "Discrimination" is defined by 5 U.S.C.A. § 2302(b)(1) (West Supp. 1979).
165. 5 U.S.C.A. § 7121(d) (West Supp. 1979).
166. *Id.*

120 days of the MSPB's receipt thereof.[167] If the MSPB fails to decide the case within this period, the aggrieved employee may file a civil action in federal district court 180 days after the complaint was filed with the MSPB.[168] If the MSPB makes its determination within the requisite 120 day period, the employee may seek review of the MSPB decision by the Equal Employment Opportunity Commission (EEOC)[169] or in federal district court.[170] If the employee elects to seek EEOC review, the EEOC must render a decision within 180 days. If the EEOC does not render a decision within 180 days, the employee may file a civil action in federal district court.[171] A decision by the EEOC within the statutory period is judicially reviewable.[172]

On the other hand, the employee may elect to pursue the discrimination complaint as a grievance under the negotiated grievance procedure. If the matter is not resolved under the negotiated grievance procedure, either the agency-employer or the exclusive bargaining representative may invoke binding arbitration.[173] Prior to invocation of binding arbitration, the employee may request the EEOC to review a "final decision" concerning the grievance.[174] This "final decision" can occur at any stage of the negotiated grievance procedure prior to invocation of arbitration, and the EEOC decision is judicially reviewable.[175] If the EEOC fails to decide the matter within 180 days from the date of the request for review of the "final decision," the employee may file a civil action in federal district court.[176]

If binding arbitration is invoked prior to the employee's filing of a request for review of a "final decision" with the EEOC, the arbitration forum is controlling, and the EEOC may not intervene. Once the arbitration award has been issued, either party to the arbitration may file exceptions to the arbitration award with the FLRA.[177] However, since the FLRA decision is a "final decision," EEOC review of the arbitration award may be obtained at this point. The EEOC decision is judicially reviewable,[178] and if the EEOC fails to decide the matter within 180 days, the employee

167. *Id.* § 7702(a)(2).
168. 42 U.S.C. § 2000e-16(c) (Supp. V 1975).
169. 5 U.S.C.A. §§ 7121(d), 7702(b)(1) (West Supp. 1979).
170. *Id.* § 7703(a)(1).
171. 42 U.S.C. § 2000e-16(c) (Supp. V 1975).
172. 5 U.S.C.A. § 7703(a)(1) (West Supp. 1979).
173. *Id.* § 7121(b)(3)(C).
174. *Id.* § 7121(d).
175. *Diagram, supra* note 150.
176. 42 U.S.C. § 2000e-16(c) (Supp. V 1975).
177. 5 U.S.C.A. § 7122(a) (West Supp. 1979).
178. *Diagram, supra* note 150.

may file a civil action in federal district court.[179]

Permitting judicial and EEOC review of an arbitration award reflects the Act's compliance with the recent landmark United States Supreme Court decision in *Alexander v. Gardner-Denver*.[180] The Court held that an employee does not forfeit his private cause of action for employment discrimination[181] by initially pursuing the matter to final arbitration under the nondiscrimination clause of a collective bargaining agreement. The employee is not viewed as attempting to seek review of the arbitrator's decision by instituting an action under Title VII of the Civil Rights Act of 1964; rather, he is asserting a statutory right independent of the arbitral process.[182] If the federal employee has taken his grievance through binding arbitration, "the federal court should consider the employee's claim de novo and admit the arbitral decision as evidence and accord it such weight as the court deems appropriate."[183]

Removal, Demotion and Suspension: Section 4303 and Section 7512 Cases

There are two types of cases in which an employee may use either the negotiated grievance procedure or the statutory appeal procedure:[184] removals or demotions for unacceptable performance (section 4303 cases);[185] and adverse actions such as removals or suspensions for more than fourteen days, a reduction in grade or pay,[186] or furloughs of thirty days or less (section 7512 cases).[187] The employee exercises his option upon filing a timely notice of appeal under the statutory appeal procedure, or by tendering a timely written grievance under the provisions of the negotiated grievance procedure.[188] Diagram 3 illustrates the general procedure for processing section 4303 and section 7512

179. 42 U.S.C. § 2000e-16(c) (Supp. V 1975).
180. 415 U.S. 36 (1974).
181. 42 U.S.C. § 2000e-16(c) (Supp. V 1975).
182. 415 U.S. at 56-58.
183. *Id.* at 59-60.
184. 5 U.S.C.A. §§ 7121(e)(1), 7701 (West Supp. 1979).
185. *Id.* § 4303.
186. Reductions in rank not involving a reduction in grade or pay are no longer appealable adverse actions under the Act. UNITED STATES CIVIL SERVICE COMMISSION, ANALYSIS OF THE CIVIL SERVICE REFORM ACT OF 1978, FACT SHEET NO. 2 (1978), *reprinted in* GOV'T EMP. REL. REP. 781:73, 75 (October 16, 1978).
187. 5 U.S.C.A. § 7512 (West Supp. 1979).
188. *Id.* § 7121(e)(1).

cases.[189]

Assuming first that the employee elects to pursue the matter under the negotiated grievance procedure and the grievance is not satisfactorily settled, either the exclusive representative or the agency-employer may invoke binding arbitration.[190] The arbitrator must apply the same standards in deciding the case as would have been applied if the case had instead been submitted to the MSPB pursuant to a statutory appeal procedure.[191] Therefore, judicial review of an arbitration award is obtainable in the same manner and under the same conditions as if the matter had been decided by the MSPB.[192] However, arbitration awards involving section 4303 and section 7512 cases are not appealable to the FLRA, as are other types of arbitration awards,[193] because of this limited arbitral standard of inquiry.

Should the employee instead elect to raise the matter under the statutory appeal procedure, the Act prescribes two separate standards of review for the MSPB to apply. In section 4303 cases, the action of the agency-employer will be upheld by the MSPB if such agency action is supported on the record by "substantial evidence."[194] All other agency actions (section 7512 cases) must meet the tougher standard of "preponderance of the evidence" in order to be sustained by the MSPB.[195] Whether the matter goes to binding arbitration or to the MSPB for resolution, the final decision under either procedure is governed by the same standard of judicial review.[196] The reviewing court is directed to review the

189. Adapted from *Diagram, supra* note 150.

190. 5 U.S.C.A. § 7121(b)(3)(C) (West Supp. 1979).

191. *Id.* § 7121(e)(2). The obvious rationale for binding the arbitrator to the statutory standards of review is to discourage forum shopping and to ensure conformity between arbitration decisions and those of the Merit Systems Protection Board (MSPB). S. REP. No. 95-969, 95th Cong., 2d Sess. 3 (1978).

192. 5 U.S.C.A. § 7121(f) (West Supp. 1979).

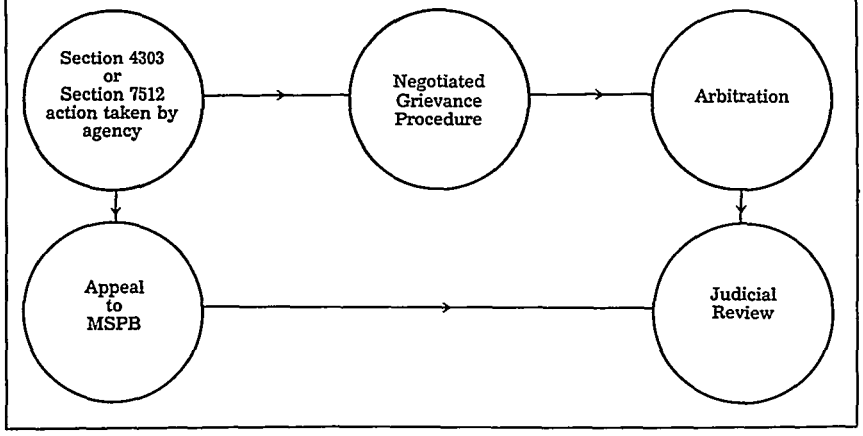
193. *Id.* § 7122(a).

194. *Id.* §§ 7121(e)(2), 7701(c)(1). The arbitrator must apply this same standard in considering section 4303 cases brought under the negotiated grievance arbitration procedure.

195. *Id.* § 7701(c)(1)(B). The arbitrator must apply this same standard in considering section 7512 cases brought under the negotiated grievance arbitration procedure. *See* Heise, *Adjudicatory Aspects of the Civil Service Reform Act of 1978 Workshop*, Court of Claims 1979 National Judicial Conf., Wash., D.C. (May 1979), *reprinted in pertinent part in* GOV'T EMP. REL. REP. 811:9-11 (May 21, 1979), suggesting that the constitutionality of this two-track standard of proof will no doubt be challenged soon in the United States Court of Claims. The challenge will arise because a separation for unacceptable performance is in effect an adverse action depriving the employee of his right and title to his government position and, therefore, should be subject to the more stringent standard applicable to other adverse actions, *i.e.*, requiring a preponderance of the evidence to sustain the agency action.

196. 5 U.S.C.A. §§ 7121(f), 7703(a) (West Supp. 1979).

DIAGRAM 3—SECTION 4303 AND SECTION 7512 CASES



entire record of the proceedings and hold unlawful and set aside any agency action, findings or conclusions found to be: "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule or regulation having been followed; or (3) unsupported by substantial evidence."[197]

There exists considerable uncertainty as to the weight federal courts will accord federal sector arbitration awards in section 4303 and section 7512 cases because of the *Alexander v. Gardner-Denver*[198] decision. In light of the Supreme Court's dicta, federal sector arbitrators may have to develop a more elaborate record, apply stricter standards of evidence than they are accustomed to in fashioning their awards, and cultivate a level of recognized expertise with respect to federal sector labor relations disputes in order for their awards to be accorded any meaningful weight by the federal judiciary.[199]

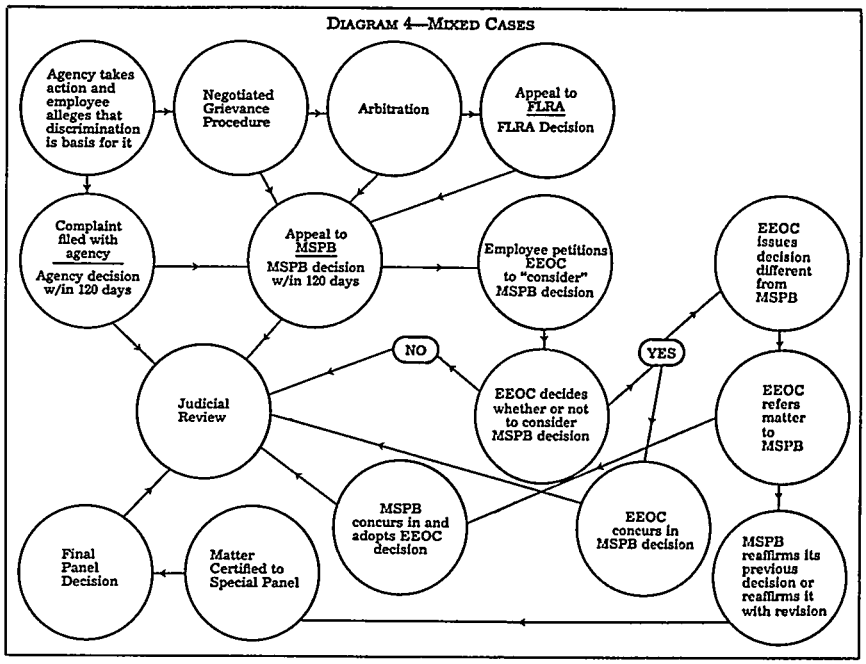
Finally, the question has been raised whether the Director of the Office of Personnel Management may also be able to obtain judicial review of arbitration awards interpreting or having a substantial impact upon a civil service law, rule or regulation.[200] Un-

197. *Id.* § 7703(c).
198. 415 U.S. 36 (1974).
199. *Id.* at 56-60.
200. 5 U.S.C.A. § 7703(d) (West Supp. 1979) gives the Director of OPM the right to obtain judicial review of any final order or decision of the MSPB interpreting a

doubtedly, if this practice is permitted by the federal judiciary, it will further erode the already uncertain finality of federal sector arbitration awards.

Mixed Cases

"Mixed cases" involve both an allegation of unlawful employment discrimination and an adverse action. As illustrated by Diagram 4, the Act creates an incredibly complex procedure for resolving "mixed cases."[201]



The employee has the option of processing the matter under the negotiated grievance procedure or pursuant to a statutory appeal procedure.[202] If the employee elects to process the "mixed" grievance under the nondiscrimination clause of the collective bargaining agreement and the matter is not satisfactorily resolved, the employee has two options. The employee may request the MSPB to review the pre-arbitration "final decision" or await

civil service law, rule or regulation affecting personnel management, and MSPB decisions having a substantial impact on civil service laws, rules, regulations or policy directives. The Act requires the Director to have unsuccessfully attempted to initially petition the MSPB for reconsideration of its decision before the Director may petition for judicial review.

201. Adapted from *Diagram, supra* note 150.

202. 5 U.S.C.A. § 7702 (West Supp. 1979).

the union's invocation of binding arbitration.[203] Once binding arbitration has been invoked, however, the matter proceeds to arbitration, the parties present their positions, and the arbitrator fashions an appropriate award. Except in certain types of cases,[204] either party to the arbitration may file exceptions to the award with the FLRA, which will review the award and determine whether or not it is deficient on private or federal sector grounds.[205] The FLRA's final decision is then appealable to the MSPB as a "final decision" within the MSPB's jurisdiction.[206]

From this point on, the process is the same whether the employee elects to pursue the "mixed case" pursuant to the statutory appeal procedure to the MSPB,[207] or process the matter under the negotiated grievance procedure. The only difference between the two procedures is that under the statutory appeal procedure there is an added feature. If the agency-employer fails to resolve the matter within 120 days of initial presentment, the employee may file a civil action in federal court and be afforded a trial de novo of the discrimination claim,[208] or he may appeal the matter to the MSPB.[209]

For the remainder of this discussion of "mixed cases," it will be assumed that the agency-employer made its decision within 120 days of initial presentment, or that, if it did not, the employee elected to take an appeal to the MSPB rather than attempting to invoke the judicial review machinery at this relatively early stage. Hence, the case brought under the statutory appeal procedure has progressed to the same stage of development as if it had been processed under the negotiated grievance procedure—appeal to the MSPB.

If the MSPB fails to decide the matter within 120 days of receipt of the appeal, the employee may file a civil action in federal court on the basis of the employment discrimination claim and will be afforded a trial de novo of the case.[210] Assuming the MSPB ren-

203. *Id.* § 7121(d).
204. *Id.* §§ 4303, 7512. Section 4303 and § 7512 cases are not appealable to the FLRA as are other types of arbitration awards. 5 U.S.C.A. § 7122(a), (f) (West Supp. 1979).
205. *Id.* § 7122(a).
206. *Id.* § 7121(d).
207. *Id.* §§ 7121(a), 7702.
208. *Id.* §§ 7702(e)(1)(A), 7703(c).
209. *Id.* § 7702(e)(2).
210. *Id.* §§ 7702(e)(1)(A), 7703(b)(2), (c).

ders a decision within 120 days, the employee has the option of petitioning the EEOC to "consider" the decision of the MSPB,[211] or of seeking judicial review of the MSPB decision.[212] This option is exercisable within 30 days of the MSPB decision. If the judicial review alternative is selected, the standard of review is not the traditional one utilized in reviewing section 4303 and section 7512 cases[213] since the employee's "mixed case" involves an employment discrimination claim. Instead, the employee is entitled to a trial de novo by the reviewing court.[214] If the employee instead elects to petition the EEOC to "consider" the decision of the MSPB, the EEOC has 30 days within which to decide whether or not to "consider" the MSPB decision.[215]

The Act prescribes that the total time frame for all remaining steps shall not exceed 180 days. Once this period has elapsed, the employee may file a civil action in federal court.[216] Therefore, this statutory time frame becomes an important factor in post-EEOC review and cannot be neglected by reviewing agencies.

Should the EEOC decide not to "consider" the decision of the MSPB, judicial review of the MSPB decision is immediately available.[217] If the EEOC does decide to "consider" the MSPB decision, it must, within 60 days of this determination, "consider" the entire record of the MSPB proceedings, take additional evidence necessary to supplement the record, and either concur in the decision of the MSPB or issue a contrary decision.[218] If the EEOC concurs in the MSPB decision, the decision of the MSPB constitutes a judicially reviewable action affording the employee a trial de novo of the case.[219] However, if the EEOC issues a decision contrary to that of the MSPB, the EEOC immediately refers the matter to the MSPB. The MSPB then has 30 days within which to: concur and adopt in whole the EEOC decision; reaffirm the initial MSPB decision; or reaffirm the initial MSPB decision with revisions.[220]

If the MSPB concurs and adopts in whole the EEOC decision,

211. *Id.* § 7702(b)(1).
212. *Id.* § 7703(a)(1).
213. *Id.* § 7703(c).
214. *Id.*
215. *Id.* § 7702(b)(2). A rather limited scope of review is utilized by the EEOC in determining whether or not to accept an employee's petition for review of an MSPB decision, culminating in a merits determination as step two of the EEOC decision-making process once it decides whether to "consider" the MSPB decision. *See* 5 U.S.C.A. § 7702(b)(3) (West Supp. 1979).
216. *Id.* § 7702(e)(1)(C).
217. *Id.* § 7703(a)(1), (c).
218. *Id.* § 7702(b)(3).
219. *Id.* §§ 7702(b)(5)(A), 7703(a)(1), (b)(2), (c).
220. *Id.* § 7702(b)(5)(B), (c).

the matter is judicially reviewable, and entitles the employee to a trial de novo of the case.[221] However, if the MSPB either reaffirms its previous decision or reaffirms with modifications, the matter is immediately certified to a "Special Panel."[222] Within 45 days of certification of the matter to the Special Panel, the Panel must review the entire administrative record, permit the aggrieved employee to appear and present oral arguments, resolve the issues in dispute, and issue a final Panel decision.[223] The final decision of the Special Panel is judicially reviewable, entitling the employee to a trial de novo of the case by the reviewing court.[224]

CONCLUSION

A variety of criticisms have flourished in the wake of the enactment of the Civil Service Reform Act of 1978. One of the major criticisms is that the subject matter of federal sector collective bargaining is too limited. Because the most important terms and conditions of employment are controlled by statute rather than contract,[225] disputes over wages, hours, overtime, holidays, pensions, vacations, insurance and the like are not arbitrable in the federal sector. It is unlikely that Congress will attempt to expose these important matters to collective bargaining in the federal sector.

Another perceived difficulty with the Act is that, except for claimed violations of constitutional rights such as employment discrimination, judicial review of arbitration awards is not generally or easily obtainable.[226] This corresponds with the private sector practice and achieves a desirable degree of finality in federal sector labor relations dispute arbitration.

Hopefully, the Comptroller General has been precluded from making after-the-fact determinations that an agency-employer

221. *Id.* §§ 7702(c), 7703(c).

222. *Id.* § 7702(d)(1), (d)(6)(A). The Special Panel is composed of a designated EEOC member, MSPB member, and a Chairman of the Special Panel appointed by the President with the advice and consent of the Senate for a six-year term.

223. *Id.* § 7702(d)(2)(A), (d)(4). Enforcement of the final Special Panel decision is the responsibility of the MSPB. 5 U.S.C.A. § 7702(d)(3) (West Supp. 1979).

224. *Id.* §§ 7702(d)(2)(A), 7703(c).

225. The conditions of employment which have been established pursuant to Title V, U.S.C., 80 Stat. 378 (1970) constitute a comprehensive package of benefits, preempting collective bargaining over such matters as wages, hours of work, insurance, leave, retention and a variety of other basic conditions of employment.

226. D. NOLAN, LABOR ARBITRATION LAW AND PRACTICE 201 (1979).

cannot legally comply with an arbitration award containing a back pay award that has either been upheld by or not appealed to the FLRA.[227] The legislative history of the Civil Service Reform Act of 1978 confirms the conclusion that the provisions for final and binding arbitration were intended to make certain that the awards of arbitrators, once they became final, were not subject to further review by any other administrative body.[228] However, the finality of arbitration awards in the federal sector is precarious in pure discrimination cases, section 4303 and section 7512 cases, and "mixed cases."[229]

There is also some question whether federal employees' constitutional rights are adequately safeguarded by a system which restricts employees to the arbitral forum, makes the utilization of that forum dependent upon the union's willingness to take cases to arbitration, and precludes judicial review of awards except on very narrow grounds.[230] The FLRA must be sensitive to abuses of the Act's framework for final and binding arbitration and should either permit aggrieved employees to attack arbitration awards or invoke arbitration themselves if the union has breached its duty of fair representation.

Another criticism of the Act is that the federal government, as an employer, seeks to enjoy its statutory protection against strikes by its employees[231] without in turn affording them a meaningful arbitration procedure with an effective final and binding consequence in all cases.[232] It is clear that the Act creates a confusing maze of forums empowered to hear and resolve federal sector labor relations disputes in addition to reviewing supposedly final and binding arbitration awards. Fortunately, the FLRA is committed to the fundamental proposition that "the value and strength of labor dispute arbitration depends upon the finality of the arbitrator's decision. The disputing parties must be willing to abide by the arbitrator's decision, and the courts and agencies authorized to review the decision must be reluctant to interfere with

227. 5 U.S.C.A. § 7122(b) (West Supp. 1979).

228. *See* Conference Report on S. 2640, The Civil Service Reform Act of 1978, 124 CONG. REC. H11,624, H11,667 (daily ed. Oct. 5, 1978).

229. *See* Diagrams 2, 3 & 4 and accompanying text *supra*.

230. Grodin, *Judicial Response to Public Sector Arbitration*, in PUBLIC SECTOR BARGAINING 240-41 (1979); *see also* Board of Educ. v. Associated Teachers of Huntington, 30 N.Y.2d 122, 282 N.E.2d 109 (1972) (New York Court of Appeals suggests that where rights external to the negotiated agreement are involved, judicial review might extend to determining whether the arbitration procedure was fair and regular). This constitutes a heightened scope of judicial review of arbitration awards not traditionally employed.

231. 5 U.S.C.A. § 7116(a)(7), (b)(7) (West Supp. 1979).

232. Gamser, *Back-Seat Driving Behind the Back-Seat Driver: Arbitration in the Federal Sector*, PROC. 31ST ANN. MTG. NAT'L ACAD. ARB. 273, 280 (1979).

it."[233] The FLRA, other agencies authorized to review arbitration awards, and the federal courts should heed this sound principle of effective labor dispute arbitration when confronted with arbitration award appeals, and apply only a minimal level of scrutiny to such awards. If they fail to do so, the design for improved contract administration and negotiations in the federal sector[234] and the intended finality of federal sector labor dispute arbitration will be seriously undermined by the abundant opportunities for review of the final and binding arbitration award. Such a consequence will undoubtably transform the Civil Service Reform Act of 1978 into "The Full Employment Act for the Federal Labor Relations Bar."[235]

VAN ALLYN GOODWIN

233. Frazier, *supra* note 67, at 713.

234. *See* Miserendino, *Arbitration in the Federal Service: The Regulation of Remedies*, 30 ARB. J. 129, 141 (1975): "[T]he appeal of an arbitration award to a fourth-party interventionist and/or the modification of an award on the basis of the fourth-party interventionist's interpretation results in the improper utilization of the arbitral process. . . ."

235. Frazier, *Labor-Management Relations in the Federal Government*, 30 LAB. L.J. 131, 136 (1979).